Rattan Art Gallery, Ltd. *and* **ILWU Local 142, Petitioner.** Case 37-RC-2542

February 17, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Pursuant to the provisions of a Stipulation for Certification Upon Consent Election, executed April 22, 1980, an election by secret ballot was conducted on May 15, 1980, under the direction and supervision of the Regional Director for Region 20, among the employees in the stipulated unit. At the conclusion of the election, the parties were furnished a tally of ballots which showed that of approximately 38 eligible voters, 37 cast valid ballots, of which 25 were for, and 12 against, the Petitioner, and 1 ballot was challenged. The challenged ballot was not sufficient to affect the outcome of the election. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on September 16, 1980, issued and duly served on the parties her report on objections in which she recommended that all the objections be overruled and a certification of representative be issued. The Employer filed timely exceptions to the Regional Director's recommendations that its objections should be overruled, asserting that the election should be set aside and that the Board should direct a second election or, in the alternative, that a hearing be held. The Petitioner filed an answer to the Employer's exceptions urging that the decision to overrule the objections be sustained for lack of evidence of genuine issues of material fact.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Regional Director's report, the Employer's exceptions thereto, and the entire record in this case, and makes the following findings:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees, as stipulated by the parties, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time and regular part-time employees engaged in production and delivery for the Employer located at 922 Austin Lane, Honolulu, Hawaii; excluding all office clerical, confidential, professional and supervisory employees, guards and/or watchpersons as defined in the Act.

5. The Board has considered the Regional Director's report, the Employer's exceptions and brief, the Petitioner's answer, and the entire record in this case and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.

The Employer's exception contends that the Regional Director did not conduct the election with due regard to the needs of the Filipino-speaking employees who could not read or speak English, since a portion of the bilingual election notice which explains employees' rights to refrain from union activity was not only partially omitted, but the part that was set forth was neither accurately nor clearly translated, and the notice failed to set forth the standard provisions. We find merit in the Employer's exception.

The notice of election and the ballots were printed in both English and Ilocano, a Filipino dialect, to accommodate an undisclosed number of employees in the unit who speak such dialect and have difficulty comprehending abstract ideas in English. The translation for the notice of election and the ballot into Ilocano was performed by a staff member of the Language Bank of the University of Hawaii. The Employer's attorney contacted the Subregional Office orally on May 9 and by letter on May 12, 1980, concerning two alleged ambiguities in the ballot and notice of election. The Employer contended that the word "kadi" should be inserted on the ballot after the word "kalikaguman" in order to make the question on the ballot more direct. The Subregional Office contacted its translator who indicated that the Employer's suggestion would improve the translation by making the question more direct. On May 12 the Subregional Office requested that the Employer's attorney have the word "kadi" inserted on the notices posted at the Employer's premises, and the Employer's attorney agreed to do so. However, the

Employer did not insert the word "kadi" on the notices as he believed that if he did so he could have been accused of violating the prohibition against defacing the notices. The ballots were corrected in accordance with the Employer's suggestion.

As to the notice of election, the Employer's attorney also requested a change in the Ilocano translation of that part of the notice advising employees of their right "to refuse to do any or all of these things," on grounds that the translation was in "uncommon terminology which does not clearly convey the right to refrain." The Subregional Office, after contacting its interpreter, decided that its translation was sufficient. The language proposed by the Employer translates into "to refuse to do any or all of these things," to be used in substitution for the language used in the Board notice of election which translates into "to avoid any or all of the following actions."

However, the Regional Director's investigation disclosed that (1) the translation used in the notice is somewhat confusing inasmuch as no list of "actions" follows, and (2) the translation of this paragraph did not set out the rest of the sentence in the Board notice of election, which refers to the fact that an employee may:

> . . . refuse to do all of these things, unless the Union and Employer, in a State where such agreements are permitted, enter into a local union security clause requiring employees to join a union.

The Regional Director concluded that, even with this omission in the notice of election, it adequately apprised the employees of their rights and of the purpose of the election, i.e., to determine whether the employees wish to be represented for purposes of collective bargaining by the Petitioner, noting that the notice of election was not otherwise complained about, and no evidence was furnished which would indicate that the voters did not understand this purpose. We disagree.

The Board has long held that it is its function and duty under the National Labor Relations Act to establish in election proceedings conditions as nearly ideal as possible to determine the uninhibited desires of the employees.[1]

Pursuant to its insistence that "laboratory" conditions be maintained to foster free expression of voter preference, the Board deems necessary employee access to that section of its notice of election entitled "Rights of Employees," which was adopted for the twofold purpose of (1) alerting employees of their rights under the Act, and (2) warning unions and management alike against conduct impeding fair and free elections.[2] In addition to its insistence that employees have access to the "Rights of Employees" section of its notice of election, the Board has held that a notice containing such information, when posted by an employer at the last minute before an election, destroyed the laboratory conditions for holding a fair election, as employees were deprived of an opportunity to discuss election issues with fellow employees and friends so they might come to a reasoned decision by the date of the election.[3] An incomplete translation may, obviously, have a similar effect on non-English-speaking employees.

Contrary to the Regional Director, we find that the laboratory conditions necessary for eligible employees to make a free and reasoned choice in the election were not present herein, because the Board's translation of its notice of election into the Ilocano language was confusing and incomplete. The Employer, through its attorney, timely notified the Subregional Office of the discrepancies in the notice and proposed language which would more clearly explain the "Rights of Employees" section of the notice. The Regional Director in her investigation, in effect, decided that the Board's translation was sufficient, notwithstanding that she found that the translation failed to set out that part of the language in the "Rights of Employees" section of the notice of election which refers to the fact that an employee may:

> . . . refuse to do all of these things [that is, refrain from union activity], unless the Union and Employer, in a State where such agreements are permitted, enter into a local union security clause requiring employees to join a union.

Such omission from a notice of election translated by the Board hardly assures an effective and informed expression of voting intent in the selection of a bargaining representative.[4] We conclude that

[1] *General Shoe Corporation*, 77 NLRB 124, 127 (1948).

[2] *Overland Hauling, Inc.*, 168 NLRB 870 (1967). The Board set aside an election where the notice of election was posted in such a way that the section of the notice entitled "Rights of Employees" was turned underneath the remaining portion of the notice and, therefore, was not visible to the employees eligible to vote. The Board interpreted the manner of posting as a patent attempt to minimize the effect of the Board's notice.

[3] *Kilgore Corporation*, 203 NLRB 118 (1973).

[4] We cannot agree with our colleague that the omission from the posted *notice* advising employees about to vote that they may refrain from union activity—absent a bargaining contract with a union-security clause in States such as Hawaii where such clauses are permitted—is a minor omission. See *Overland Hauling, Inc.*, 168 NLRB 870 (1967), where the Board set aside an election because the "Rights of Employees" section in the notice was turned underneath during the posting period, thus not visible to prospective voters. The Board had then recently revised the official notice of election form to include an expanded "Rights of Employees" section and it said:

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the voters were not fully informed and that the omission from the notice of election of the standard statement of employee rights destroyed the laboratory conditions necessary to a fair election. Accordingly, we shall set the election aside and direct a second election.[5]

ORDER

It is hereby ordered that the election previously conducted herein on May 15, 1980, be, and it hereby is, set aside.

[Direction of Second Election[6] omitted from publication.]

MEMBER ZIMMERMAN, dissenting:

Contrary to my colleagues, I find that the imprecise translation of one phrase of the Board's election notice and the omission from the notice of the language apprising employees of the fact that a union and employer may enter into a local union-security clause requiring employees to join a union did not impair the holding of a free and fair election. Like the Regional Director, I conclude that the notice of election posted here adequately apprised the Employer's employees of their rights and that the purpose of the election was to determine whether or not they wished to be represented for purposes of collective bargaining by the Petitioner.

The ballot, corrected by the addition of "kadi," cured any possible confusion which might have been caused by the absence of that word in the sample ballot contained in the election notice. The translation of "to avoid any or all of the following actions," instead of "to refuse to do any or all of these things," is not so confusing, misleading, or inaccurate as to cast doubt on whether the employees were able to understand what was at issue in the election. In the absence of evidence that the employees were not made aware of their rights during the election campaign by means other than the notice, the imprecision of the official translation appears to be insignificant to the question of whether the employees understood the purpose of the election.

For similar reasons, I do not find that the omission of the qualifying language of the employees' right to refrain from union activities requires that the election be set aside. Again, on the state of this record I am not convinced that this omission prevented the employees from being adequately informed of their rights and the purpose of the election. It seems reasonable to assume that in the course of what appears to have been a strong give-and-take preelection campaign the employees were effectively apprised of those rights.[7] In any event, since the election notice was complete in all other respects, the omission was minor and inconsequential.[8]

Accordingly, I would adopt the recommendations of the Regional Director to find without merit the Employer's objections and, based on the results of the election, I would certify the Petitioner as the collective-bargaining representative of the Employer's employees in the unit found appropriate.

As appears from the official notice form itself, this revision was adopted for the purpose of alerting employees to their rights under the Act and in order to warn unions and management alike against impeding fair and free elections.

Our colleague considers the analogy to the *Kilgore* decision, 203 NLRB 118 (1973), inapt because there was no posting until the day before the election when "it was too late to be meaningful." He is willing to overlook the fact that the posting in this case was that of an *incomplete* notice. As we view it, an essential part of the notice was not posted at all.

In fact, we view it as surprising that our colleague would attempt to distinguish *Overland Hauling, Inc.*, on the ground that, in this case, only a "single right" was not visible: the *right to refrain* from self-organization, collective bargaining, or other mutual aid or protection. In effect, our colleague finds inconsequential the failure to exhibit that part of the Board notice that alerts the voter to the second half of Sec. 7 of the Act.

[5] See *Fiber Leather Mfg. Corp.*, 167 NLRB 393 (1967), where the election was not conducted with due regard to the needs of employees who spoke Portuguese rather than English.

[6] [*Excelsior* footnote omitted from publication.]

[7] The nature of the Employer's objections and the facts disclosed by the Regional Director's investigation of those objections give rise to the inference that both parties campaigned vigorously.

[8] My colleagues analogize the situation here to the late posting of notices in *Kilgore Corporation*, 203 NLRB 118. The analogy is inapt. In that case, there was no posting until the day before the election. Consequently, the employees were denied notice by the Board of *any* of their rights until it was too late to be meaningful. Here, the posting was accomplished in sufficient time. More importantly, with the exception of this minor omission, the employees were informed of their rights and what was involved in the election by the posted notice of the election.

I also find my colleagues' reliance upon *Overland Hauling, Inc.*, 168 NLRB 870, misplaced. In that case, the notice was posted in such a way that the entire section explaining the "Rights of Employees" was concealed from the view of potential voters in what the Board found to be a patent attempt by the employer to minimize the effect of the Board's notice. Here, information regarding a single right was omitted—the right, if the Union were selected, to refrain from union membership absent a future contractual provision requiring otherwise. The notice apparently accurately reflected all other employee rights and further listed the customary examples of conduct which interfere with the rights of employees and may result in setting aside the election. Moreover, the notice here was incomplete as a result of an inadvertent translation error which cannot be attributed to anyone having a stake in the outcome of the election.